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No. 554

In the Supreme Court of the United States

OCTOBER TERM, 1945

STANLEY HOSTER, ZIGMA PEET LEE, JAMES DAWSON, AND THOMAS F. O'ROURKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 354

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, AND TERENCE P. O'ROURKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 272–276) is reported at 150 F. 2d 82. The opinion of the district court overruling petitioners' demurrers to the indictments (R. 12–17) is reported at 55 F. Supp. 372.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 14, 1945 (R. 277), and a petition for rehearing (R. 278–287) was denied on July 18, 1945 (R. 289). The petition for a writ of

certiorari was filed on August 21, 1945, and was granted on October 15, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether employees of a common carrier who use the power of their positions to discriminate among passengers by collecting sums in excess of established rates, appropriating the excess for themselves, are punishable under Section 10 (1) of the Interstate Commerce Act.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, and of the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

Petitioners Howitt, Lee, and Dewhurst were indicted in the District Court for the Southern District of Florida for conspiracy (18 U. S. C. 88) to violate the Interstate Commerce Act in that, as employees of the Florida East Coast Railway Company, an interstate carrier subject to the

Interstate Commerce Act; they conspired to collect and receive unjust and unreasonable charges for passenger transportation, in violation of Section 1 (5) (a) of the Act; to collect and receive from certain persons greater compensation for service in the transportation of passengers than would be collected from other persons for similar service, in violation of Section 2; to give undue preference and advantage to particular persons and subject others to undue prejudice and disadvantage, in violation of Section 3 (1); and to collect and receive greater and different compensation for transportation of passengers than specified in tariff schedules filed with the Interstate Commerce Commission, in violation of Section 6 (7) (R. 1–8). Such action is made punishable by Section 10 (1) of the Act (Appendix, *infra*, pp. 20–21). Howitt and Dewhurst sold tickets for the railway company, and Lee was a diagram clerk in charge of allocating Pullman or reserved coach seat reservations (R. 105, 126, 158, 171).

Petitioner O'Rourke, also employed by the same carrier as a ticket seller, was charged in a separate indictment with committing substantive offenses of the same nature as are involved in the conspiracy indictment against the other petitioners (R. 30–49).

Petitioners' demurrers to the indictments (R. 9–11, 50–53) and their motion for a directed

verdict (R. 239–241)[1] on the ground that their conduct was not within the purview of the Interstate Commerce Act because it was not alleged or proved that the carrier itself was a principal offender, were overruled by the district court (R. 12–17, 55, 241). Petitioners also excepted to the district court's charges (R. 257).

The evidence in the conspiracy case disclosed that during the winter of 1943 great difficulty was encountered by applicants for railroad transportation at Miami, Florida, in obtaining accommodations (R. 125, 139). Certain of the hotels employed persons whose duty it was to procure railroad accommodations for their guests (R. 124, 139, 153, 158, 166, 195). Arrangements were made between the hotel employees and petitioners Howitt, Lee, and Dewhurst to secure such accommodations by payment to petitioners of sums in excess of the regular fares, by dividing moneys received by the hotel employees from the guests (R. 125, 126, 127, 128, 134, 147, 153, 155, 169, 231, 236), or by the hotel employees' paying the excess amounts (R. 127, 128, 130, 131, 133, 134, 141, 153, 155, 156, 157, 159, 161, 166), or by having the passenger making the payment (R. 133, 142, 144). The excess payments were a condition precedent to securing a ticket (R. 136, 148, 154, 156), and passengers were told that they could not get reservations without making excess payments (R. 169, 230, 235, 236–237).

[1] The cases were consolidated for trial upon petitioners' motion (R. 100).

The evidence as to petitioner O'Rourke was in similar vein and showed that, while acting as a ticket seller, he demanded and collected prices in excess of the published tariffs for railroad accommodations (R. 183–184, 197, 216–217, 220–221).

Petitioners were each convicted after a jury trial (R. 61, 62). Petitioners Howitt, Lee, and Dewhurst were each sentenced to imprisonment for a year and a day and to pay a fine of $1,000 (R. 63–66), and petitioner O'Rourke was sentenced to concurrent terms of imprisonment for 18 months on the eight counts on which he was convicted and, generally, to pay a fine of $1,000 (R. 67–68). The convictions were affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 277).

SUMMARY OF ARGUMENT

Sections 1 (5), (a), 2, 3 (1), and 6 (7) of the Interstate Commerce Act prohibit carriers from unlawfully discriminating among passengers and shippers. Section 10 (1) provides for the punishment of an individual employee of a corporate carrier who commits or causes the commission of an act prohibited by these Sections. While we do

[2] Petitioner O'Rourke alleges (Br. 7, 21–22) that he was charged only with violating Section 6 (7) rather than Section 2 and hence that the proviso of Section 10 (1), imposing a prison term for unlawful discriminations (sec. 2), was inapplicable. (See Appendix, *infra*, pp. 19, 20–21.) However, the indictment (R. 30–49) also charged violations of Section 2 of the Act, which is the unlawful discrimination section (Appendix, *infra*, p. 19), and paraphrased its language (R. 32, 35, 36, 39, 40, 43, 47).

not deny that an act for which liability is sought to be imposed under Section 10 (1) must be in a broad sense action by a carrier, we do not think that the individual responsibility of a railroad employee who exercises the function conferred upon him by the railroad in dealing with the public is to be measured by the considerations which affect corporate responsibility for the acts of its employee. Petitioners caused the railroad which employed them to discriminate in favor of persons who paid more than the established rate. However innocent the railroad as an entity may have been, the fact remains that persons seeking transportation could get accommodations from that railroad only by payment of a greater fee than other passengers paid for the same service. There was thus discrimination by a carrier prohibited by Sections 1 (5) (a), 2, 3 (1), and 6 (7), which was caused by petitioners, employees of a corporate carrier, one of the classes mentioned in Section 10 (1).

The construction of Section 10 (1) as covering employees of a railroad who use their authority to discriminate among passengers is in accord with the fundamental purpose of the Interstate Commerce Act to bar discrimination in any form, as well as the purpose of Section 10 (1) to punish the individual wrongdoer rather than the corporation. The statute, though penal, should be construed in relation to the evils which it was designed to eliminate.

ARGUMENT

SINCE PETITIONERS, AS EMPLOYEES OF THE RAILROAD, IN EXERCISING THE FUNCTIONS CONFERRED UPON THEM, CAUSED THE RAILROAD TO DISCRIMINATE IN FAVOR OF PASSENGERS WHO PAID MORE THAN THE ESTABLISHED RATES, PETITIONERS WERE PROPERLY CONVICTED OF AN OFFENSE UNDER SECTION 10 (1) OF THE INTERSTATE COMMERCE ACT

The evidence in this case establishes that persons desiring transportation from Florida northward could get accommodations only if they paid to petitioners sums of money over and above the established, published rate, and that persons who did pay this extra compensation received a preference over others in a similar position. It is clear that such action by the railroad itself would have been unlawful under Sections 1 (5) (a), 2, 3 (1), and 6 (7) of the Interstate Commerce Act (Appendix, *infra*, pp. 19–20), which deal with unjust practices, and that petitioners, as persons employed by the railroad who effectuated such policy, would have been subject to punishment under Section 10 (1) of that Act (Appendix, *infra*, pp. 20–21). The narrow question here presented is whether the fact that petitioners used their positions with the railroad to perform such acts, not for the profit of the railroad, but for their own personal profit, absolves them from liability under Section 10 (1).[3]

[3] For the purposes of this case, it is unnecessary to differentiate between the substantive offenses of which O'Rourke was convicted and the conspiracy charged against the other petitioners. If the consummated acts were crimes, it was, of course, unlawful to conspire to perform them.

Petitioners contend (Br. 8, 9) that since Sections 2, 3 (1) and 6 (7) of the Interstate Commerce Act by their terms prohibit certain action by carriers as such,[4] "a person acting for or employed by" a corporate carrier cannot commit a violation of these Sections, and hence cannot be convicted under Section 10 (1), unless his acts would render the carrier itself criminally liable. They fortify their contention by reference to Section 1 of the Elkins Act (Appendix, *infra*, pp. 21–22), which, in providing for punishment of the corporation, specifies that the act of an employee "within the scope of his employment" shall also be deemed to be the act of the carrier.[5]

On its face, however, Section 10 (1) discloses a purpose to prohibit employees of a corporate carrier from using their positions to effectuate unlawful acts, whether or not the act may also be attributed to the carrier under the later Elkins

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[4] We concede that Section 1 (5) (a) also concerns action by carriers.

[5] Corporations are not liable under Section 10 (1), which was enacted in 1887. *In re Peasley*, 44 Fed. 271, 275 (C. C. N. D. Ill.); *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 736 (C. C. N. D. Ohio). In this regard, Section 1 of the Elkins Act of 1903 was designed to impute to a corporate carrier the acts or omissions of an employee acting within the scope of his employment. H. Rep. No. 3765, 57th Cong., 2d sess., p. 1. The Florida East Coast Railway is of course not liable, for petitioners were acting adversely to their employers. Cf. *American Security Company* v. *Pauly*, 170 U. S. 133, 156–157; *Scullin Steel Co.* v. *North American Co.*, 255 Fed. 945, 948 (C. C. A. 8).

Act. When Section 10 (1) was originally passed as part of the Interstate Commerce Act, no attempt was made to reach the corporation as such, but punishment was imposed only on the individual who performs the prohibited act. Section 10 (1) provides for the punishment of persons who not only do any of the acts made unlawful by the other Sections, but who cause, aid, abet, suffer, or permit the commission of such act. Moreover, it is to be noted that Section 10 prohibits conduct by a "person acting for or employed by" a carrier corporation and does not contain the additional phrase inserted in the Elkins Act that the carrier should be liable for the acts of such a person "acting within the scope of his employment." The very absence of this phrase from Section 10 (1) shows, we think, that the responsibility of the persons enumerated therein was not limited by the considerations which effect imputation of an agent's act to his corporate principal.

Concededly, the acts for which punishment may be imposed under Section 10 (1) must relate to the functions of a carrier and the unlawful acts must in a broad sense be action by a carrier. But we do not think that the personal responsibility of an employee of a carrier in relation to his dealings with the public is to be measured in terms of the ability to hold the carrier criminally responsible for the acts of a dishonest employee. In our view, it is immaterial that the railroad, as

such, may have acted innocently in the matter, and that petitioners' interest in the transactions, adverse to that of their employer, may preclude imputation of their acts to the railroad. The fact remains that persons seeking transportation from the railroad could procure accommodations from that railroad only upon payment of a greater fee than other passengers paid for the same service. All the tickets or reservations involved in this case were purchased directly from the railroad through petitioners, persons clothed by the railroad with authority to sell. Petitioners were enabled to demand the excessive rates only because they had authority to exercise the function of the railroad. Thus, irrespective of whether petitioners' acts may be attributed to the railroad for the purpose of imposing liability upon the corporation, their action was in a broad sense action by the railroad prohibited by the Interstate Commerce Act.* Petitioners, as employees of the railroad, thus caused the railroad to discriminate in favor of persons who paid more than the established rate. Hence, their conduct falls within the literal terms of Section 10 (1), and they may properly be held personally liable.

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*We think that the acts performed by petitioners were actions by a carrier in much the same sense that action by a state official who abuses the power of his office is, nevertheless, state action. See *Screws* v. *United States*, 325 U. S. 91, 110.

That a person may cause a crime to be committed through an innocent instrumentality is a well established principle of criminal law. This Court held in *United States* v. *Giles*, 300 U. S. 41, that a bank employee committed the crime of making false entries in the books of a bank by withholding deposit slips and thus causing false entries to be made by an innocent clerk. In mail fraud cases, a defendant may effect the use of the mails by depositing an out-of-town check in a bank which innocently mails it for collection. *Kann* v. *United States*, 323 U. S. 88, 93. A physician can commit the offense of unlawfully selling narcotics by issuing a prescription therefor, although the crime is not completed until a pharmacist, who may be innocent, actually fills the prescription. *United States* v. *Abdallah*, 149 F. 2d 219, 222 (C. C. A. 2), certiorari denied, October 8, 1945, No. 130, this Term. The causation in this case is different in form but not in essence. Insofar as the general public was concerned, the railroad as an entity, whether innocent or not, did discriminate among passengers, just as the innocent clerk in the *Giles* case made a false entry. Since such action was the direct, anticipated result of petitioners' deliberated conduct, petitioners caused the railroad to violate Sections 1 (5) (a), 2, 3 (1), and 6 (7) of the Act, and thus committed an offense under Section 10 (1).

The construction of Section 10 (1) to cover em-

ployees of a corporate carrier who use the authority conferred upon them to discriminate among passengers is in accord with the fundamental purpose of the Interstate Commerce Act. As this Court has frequently pointed out, "* * * it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." *Mitchell* v. *United States*, 313 U. S. 80, 94–95, and cases cited. As far as the general public is concerned, discrimination is just as much an evil when performed by railroad employees for their own profit as when performed by such employees for the profit of the railroad. In either case, the net result is favoritism and inequality. Furthermore, Congress, when it enacted Section 10 (1), was particularly interested in reaching the individual who perpetrated acts of discrimination rather than the corporation, to the extent that it did not impose liability on the corporation until the enactment of the Elkins Act sixteen years later. This intention, manifest from the face of Section 10 (1), is made abundantly clear by such legislative history as there is relating directly to that Section. Senator Cullom, Chairman of the Interstate Commerce Committee, explained Section 7 of the Sen-

ate bill (the equivalent of the present Section 10 (1)) as follows: "The purpose is to make the person responsible for the violation of the law subject to the penalty, and it is therefore provided that if the carrier is a corporation the officer, agent, or person guilty of any violation of the act shall be personally liable for the fine imposed." 17 Cong. Rec. 3473. In the House, Congressman O'Ferrall, a member of the Interstate Commerce Committee, explained the penal provisions as opening the courts to punish "the individual official or employee who willfully violates the law, aids or abets in its violation, or suffers it to be violated." 17 Cong. Rec. 7295. We submit that this emphasis on the individual wrongdoer, particularly when considered in relation to the underlying purpose of the statute to eliminate, as far as possible, all forms of discrimination, supports the view that Section 10 (1) was designed to punish anyone who used his position in a railroad corporation to effectuate acts of discrimination.

Most of the decisions in which this question has been presented have held that an employee of a railroad may be criminally liable under Section 10 (1) even though he was not acting in the interests of the railroad. In *United States* v. *Tozer*, 37 Fed. 635, 639 (E. D. Mo.), involving a prosecution against the agent of a carrier for unjust discrimination in fixing freight rates, the court rejected a contention that the indictment was defec-

tive for failure to allege that defendant had authority to perform the acts charged. The court there stated: "When an agent of a railroad is prosecuted under the statute for an unlawful act, it is not necessary, in my opinion, either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction. It is sufficient to show that the accused was in fact an agent of a railroad subject to the provisions of the act, and that the wrong was committed under color of his office or agency." This decision was expressly approved by the late Chief Justice Taft, then Circuit Judge, in *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 736 (C. C. N. D. Ohio). In *United States* v. *Estes*, 6 F. 2d 902, 905 (N. D. Ill.), the court overruled a demurrer to an indictment charging an employee of the Pullman company with violations of Section 10 (1) for charging less than the established rate for pullman accommodations. The court there stated:

> The contention that the words 'acting for or employed by,' in connection with part of section 10, involved the charge of collusion between the carrier and the one acting for the carrier, cannot be sustained. To construe section 10 so narrowly would be to open the floodgates to a line of violations of the Interstate Commerce Law which would be exceedingly detrimental to the public interest. It was undoubtedly the intention of

> Congress to put an end to discriminations against certain persons and in favor of others using the facilities of a carrier. . It is argued that, while the line of conduct charged in the indictments in these cases might have amounted to fraud or graft, still it did not amount to a violation of section 10. It was undoubtedly the purpose of Congress to hold for criminal misconduct, not only the carrier, but any officer, director, agent, or other person acting for or employed by the carrier who might be in control of the facilities for rendering service, or the service, which the passenger desired to use.[7]

The same holding is, we think, implicit in the decision of this Court in *Illinois Central Railroad Co.* v. *Messina*, 240 U. S. 395, in which one who accepted a free ride on the tender of a locomotive by permission of the engineer was held to have violated the prohibition in Section 1 (7) of the Act against the granting of free transportation by a carrier and the use of "such, * * * free transportation." It is to be noted that Mr. Justice Hughes dissented on the ground that the

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[7] The contrary decision in *United States* v. *Peterson*, 1 F. 2d 1018 (D. Mont.) is based on the theory that an employee must be acting within the scope of his employment in order to be liable under Section 10 (1). We think this decision mistakenly assumes that there can be action by a carrier only if the acts of an employee can also be a basis for holding the carrier criminally liable.

engineer had no authority to grant free transportation on behalf of the carrier.

There is no merit in petitioners' assertion that the provisions of the Interstate Commerce Act here involved "are so vague, indefinite and insufficient as not to cover the facts" (Br. 3, 7, 12–18). The substantive provisions of the Interstate Commerce Act prohibiting the practices which petitioners engaged in clearly establish ascertainable standards of guilt in respect of the lawful charges which may be made for transportation services. The schedule of rates filed by the carrier with the Interstate Commerce Commission, as required by Section 6 (7), provides the criterion in determining whether a given charge is unjust and unreasonable within the meaning of Section 1 (5) (*Kinnavey* v. *Terminal Ry. Assn. of St. Louis*, 81 Fed. 802 (C. C. E. D. Mo.), cited with approval in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426) or constitutes an undue or unreasonable preference prohibited by Section 3 (1). *Hocking Valley Ry. Co.* v. *United States*, 219 Fed. 735 (C. C. A. 6), certiorari denied, 234 U. S. 757. The remaining substantive provisions involved, Sections 2 and 6 (7), are explicit in prohibiting discrimination between persons in respect of charges for transportation services and charges in excess of those specified in the tariffs filed with the Interstate Commerce Commission.

The penal Sections of the Interstate Commerce Act are merely a means of effectuating the remedial policy of the statute and should be construed in relation to the evils which the statute was designed to eliminate. See *United States* v. *Dotterweich*, 320 U. S. 277, 283; *United States* v. *Gaskin*, 320 U. S. 527, 530; *United States* v. *Stowell*, 133 U. S. 1, 12. The rule of strict construction does not require that the statute "be strained and distorted in order to exclude conduct clearly intended to be within its scope." *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *Gooch* v. *United States*, 297 U. S. 124, 128; *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170. It is of no significance that Congress may not have contemplated the specific type of violation of which petitioners were found guilty.* As Mr. Justice Holmes said in *Illinois Central R. R.* v. *Messina*, 240 U. S. 395, 396–397, "No doubt the enactment had somewhat more formal uses especially in view, but we see no reason for limiting the prohibition to them." See also *Browder* v. *United States*, 312 U. S. 335, 339–340. We submit that petitioners' conduct flouted the fundamental purpose of the

*As a measure of caution, H. R. 3747 (Appendix to petitioners' brief XIV–XV; see also Br. 2, 20) was introduced in the House of Representatives after petitioners filed their petition for rehearing (R. 278–287) in the court below. This bill is still pending before the Committee on Interstate and Foreign Commerce, doubtless awaiting the outcome of this case.

statute and violated its literal terms. The fact that, in addition, petitioners were disloyal to their employer, should not absolve them from liability for violation of this statute.

CONCLUSION

The judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
WALTER J. CUMMINGS, JR.,
Attorneys.

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APPENDIX

The Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, et seq., provides:

Section 1. (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 2. If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company,

firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 10. (1) Any common carrier subject to the provisions of this part, or, when-

ever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

The Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, provides in part:

Section 1. Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. * * *

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

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